

3. **Necessary conditions three and four—financial incentives for MSOs to engage in raising rivals cost strategy—are not met.**

24. Recall that necessary conditions three and four both must be met for it to be the case that the MSOs have a financial incentive to engage in a raising rivals' costs strategy. In this section, I explain why, in fact, there is no basis to conclude that *either* condition is met and certainly no basis to conclude that they are jointly satisfied.

25. With respect to the third condition (significant increase in VZW subscribers), even if backhaul costs did increase significantly for VZW's rivals (an outcome I do not expect to follow from the Commercial Agreements for the reasons given in this report), such an increase in backhaul costs may not lead to a significant increase in the number of VZW subscribers. For example, even in the face of significantly higher backhaul costs, wireless carriers may choose to absorb (fully or partially) higher backhaul costs rather than increase their wireless service prices. To the extent carriers absorb the backhaul costs rather than increase wireless prices, this reduces or eliminates the possibility of an increase in VZW subscribers.⁴⁴

26. Finally, with regard to the fourth condition (economic benefit accruing to the MSOs in particular), even if one were to assume—in contrast to the evidence—that the MSOs had the ability and incentive to increase backhaul costs to VZW's rivals by an amount sufficient to

⁴⁴ In addition, I note that even if other carriers were to increase their wireless prices, this would not necessarily lead to a significant increase in VZW subscribers. The higher prices charged by other wireless carriers would also tend to raise market prices generally and thus to reduce overall demand for wireless service. Hence, as a matter of economics, it is not clear that a strategy of raising backhaul costs would lead to an increase in VZW subscribers, and thus it is not clear that the MSOs would see any increase in commissions from such a strategy. To the contrary, there is at least some countervailing incentive for Comcast to keep backhaul costs down in order to stimulate demand for wireless services.

drive a significant number of subscribers to VZW, the MSOs generally only profit when they themselves enroll a new VZW subscriber and thus earn a commission through the Agency Agreements.⁴⁵ Such commissions would be expected on only a very small percentage of subscribers switching to VZW. For example, Comcast indicates that it anticipates signing up [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] By comparison, looking at just its retail postpaid business, VZW's gross adds totaled 3.6 million *in the fourth quarter of 2011 alone*, equivalent to an annual rate of over 14 million gross adds,⁴⁷ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] Hence, even if Comcast (or other MSOs) could drive subscribers to VZW by raising its rivals' backhaul costs (a possibility I have refuted above), it would be expected to receive commissions on only a tiny fraction of those subscribers, further

⁴⁵ As I stated above, the opposing parties do not specify a clear mechanism for how the MSOs' profits would increase via a raising rivals' costs strategy. Given the opposing parties' lack of clarity, I focus on commission payments to the MSOs as the most obvious potential mechanism and I show that this mechanism is not sufficient to support a raising rival costs theory.

It is true that, beginning in 2016, any of the MSOs can opt to compete for wireless customers by becoming an MVNO. Although Comcast could potentially earn more per subscriber as an MVNO than as an agent under the Agency Agreements, all of the other reasoning and conclusions discussed above still hold, including that the diversion rate to a Comcast MVNO would be quite low. Therefore, my conclusions remain unchanged. Further, assuming that a Comcast MVNO is highly successful at some point in the future and achieves a high share (and thus has a high diversion rate), this fact itself indicates that the Commercial Agreements have indeed enabled the entry of a successful new competitor in the wireless industry, a fact which would be incongruous with opponents' theory that the Commercial Agreements reduce wireless competition.

⁴⁶ Interview with Eric Schaefer, Senior Vice President of Wireless Product Management at Comcast, July 19, 2012

⁴⁷ See "Verizon Communications Management Discusses Q4 2011 Results - Earnings Call Transcript," available at <http://seekingalpha.com/article/321637-verizon-communications-management-discusses-q4-2011-results-earnings-call-transcript?part=single>, site visited July 28, 2012.

reducing the already *de minimis* incentive to engage in such a strategy.⁴⁸

27. Based on the foregoing discussion, I conclude that the MSOs lack either the ability or the incentive to harm wireless competition by engaging in a strategy of raising VZW's rivals' backhaul costs. Marketplace outcomes support this conclusion. As noted above, since Comcast signed the Commercial Agreements with VZW on December 2, 2011, [BEGIN
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[END HIGHLY

CONFIDENTIAL] Clearly the Commercial Agreements have not stopped the MSOs from doing backhaul business with VZW's rivals on mutually agreeable terms.

III. WI-FI ISSUES

28. As noted above, the opposing parties have also expressed concerns that the Commercial Agreements will induce the MSOs to provide carrier-purchased Wi-Fi offload services in a way that discriminates against VZW's rivals in favor of VZW.⁵⁰ As I describe

⁴⁸ Indeed, in its July 25, 2012, *Ex Parte* filing, Sprint acknowledges that the "increase in the Cable Companies' unilateral incentives flowing from the agreements may be modest..." (Sprint, Notice of *Ex Parte* Communications, WT Docket No. 12-4, July 25, 2012, at 5). It then goes on to advance vague arguments regarding "coordinated incentives," but for the reasons detailed in n. 17, these arguments are without basis.

⁴⁹ Interview with Terrence Connell, Senior Vice President of Sales & Operations, Comcast Business Services, July 17, 2012. [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

⁵⁰ See, e.g., Mar. 26, 2012 Sprint Reply Comments at 12, 13; Mar. 26, 2012 CCIA Reply Comments at 19.

in this section, these concerns are highly speculative and without basis.

A. OPPOSING PARTIES' WI-FI CONCERNS ARE HIGHLY SPECULATIVE

29. I begin with two initial notes, which taken together demonstrate the speculative nature of the Wi-Fi related claims of the opposing parties. First, although any Wi-Fi use by end consumers may have the effect of offloading some traffic that would otherwise be carried on a cellular network, I assume that the opposing parties' concerns are focused on carrier-purchased Wi-Fi offload services, as opposed to more general use of Wi-Fi by end consumers. I make this assumption because I am not aware of any claim that a U.S. Wi-Fi provider has attempted to prevent particular end consumers from accessing the providers' in-home Wi-Fi networks or Wi-Fi hotspots based on the identity of the consumer's wireless carrier.⁵¹ In particular, I know of no claim that AT&T or Verizon have attempted to prevent customers of Sprint, T-Mobile, or other wireless carriers from using AT&T or Verizon Wi-Fi services in an attempt to favor their affiliated wireless carriers. If AT&T and Verizon—each of which is much more directly linked to a wireless carrier than the MSOs will be even after the Commercial Agreements take hold—are not taking such actions, any claim that Comcast or another MSO would take such steps is entirely without basis.

30. Second, given that the opposing parties' concerns are about discrimination in the provision of carrier-purchased Wi-Fi offload services, they are concerns about a market that does not presently exist. In particular, to my knowledge, there is no existing contract between

⁵¹ Interview with Tom Nagel, Senior Vice President and General Manager of Wireless Services, Comcast Communications, July 18, 2012.

a wireless carrier and any Wi-Fi service provider for Wi-Fi offload services.⁵² [BEGIN
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[END HIGHLY
CONFIDENTIAL] no such agreement has been reached.⁵³ As a matter of economics,
imposing regulatory restrictions or conditions on a market that does not yet exist runs a
serious risk of imposing unnecessary costs on Wi-Fi providers and wireless carriers, and
perhaps even harming the development and function of that market should it come into being.

**B. OPPOSING PARTIES HAVE PROVIDED NO RELIABLE EVIDENCE OF
COMPETITIVE HARM INVOLVING WI-FI SERVICES**

31. Given the discussion above, a minimum standard for imposing any sort of regulation
or condition involving Wi-Fi services should be a clear showing of competitive harm due to
the Commercial Agreements. The opposing parties have made no such showing. To the
contrary, the theories they have advanced amount to nothing more than even more speculative
and less developed versions of the baseless backhaul claims.

⁵² *Ibid.*

⁵³ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

1. **No horizontal harms or exclusivity**

32. First, as with backhaul, there is no valid theory of horizontal competitive harm. VZW and the MSOs are clearly not horizontal competitors in a market for carrier-purchased Wi-Fi offload services, as no such market exists today. Even if one speculates that such a market will come into being and that VZW and the MSOs will both be competitors in it, the Commercial Agreements would do nothing to soften horizontal competition between these entities in that potential market. In particular, like with backhaul, the agreements do not provide any mechanism (*e.g.*, a direct MSO ownership share in Verizon, or a full merger) through which an MSO's loss of a Wi-Fi customer to Verizon would either directly or indirectly benefit the MSO, or through which Verizon's loss of a Wi-Fi customers to an MSO would either directly or indirectly benefit Verizon.

33. In addition, I understand that the Commercial Agreements do not include any Wi-Fi exclusivity provisions. Under the Commercial Agreements, the MSOs are not precluded from offering Wi-Fi offload services to any wireless carrier. Likewise, VZW is not precluded from purchasing Wi-Fi offload services from any Wi-Fi service provider.

2. **No valid raising rivals' costs theory**

34. Given the lack of horizontal harm and the lack of exclusivity, any theory of harm involving Wi-Fi services must be another vertical "raising rivals' cost" theory, similar to that advanced for backhaul. However, such a theory represents pure speculation. Considering the four **necessary** conditions that one must establish to support such a theory makes this clear.

35. Most clear is the failure to meet the second necessary condition—that the input cost must represent a significant share of wireless carriers' revenues. As it stands today, Wi-Fi

offload services are not purchased by wireless carriers and thus such service make up *no part* of the carriers' costs of providing wireless service. Therefore, unlike a compelling raising rivals' cost theory, which would generally involve a critical input, a theory involving Wi-Fi offload deals with a product that is presently not an input at all. Although one can speculate on the extent to which carrier-purchased Wi-Fi offload may grow in importance over time, the fact that it is not an input purchased by any carrier today makes such an outcome uncertain and thus any raising rivals' costs theory built on this input highly speculative. For example, [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

36. In addition, the first condition—that MSOs have the power to raise prices substantially for carrier-purchased Wi-Fi offload service—also has not been established. In particular, to make their case, opposing parties not only need to speculate that carrier purchased Wi-Fi offload services will become an important input to wireless carriers, but also that the MSOs will have substantial power in the hypothetical market for such services. The opposing parties argue that this power will derive from the MSO's "extensive Wi-Fi networks within their service areas,"⁵⁵ but two points demonstrate the highly speculative nature of this argument:

- First, I understand that the cable companies' Wi-Fi networks are actually not yet particularly extensive. For example, [BEGIN HIGHLY

⁵⁴ T-Mobile, Notice of *Ex Parte* Communications, WT Docket No. 12-4, May 29, 2012, at 3.

⁵⁵ Sprint, Notice of *Ex Parte* Communications, WT Docket No. 12-4, June 19, 2012, at 3.

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- Second, even if the MSOs do continue to build out Wi-Fi networks in more cities, I understand that it is not clear that these networks, designed to provide widespread Wi-Fi access to the MSO's customers in a given city, will be a particularly good fit for the needs of cellular carriers, which will likely be focused on targeted areas of congestion.⁵⁷ Moreover, I understand that the key asset required to build a solution for targeted areas of congestion may be the wireless carriers' own data about where such congestion is occurring, and that using such data, wireless carriers may be able to purchase much more targeted Wi-Fi solutions (or develop them in-house).⁵⁸

37. Finally, the third and fourth conditions—which together indicate that the MSOs would need to profit sufficiently from a raising rivals' costs strategy to offset lost profits—fail with regard to Wi-Fi for the same reasons as they failed with regard to backhaul. Opposing parties have simply not laid out any clear mechanism through which the MSOs would gain substantial profits by harming VZW's rivals in this way. Moreover, such a strategy could impose a substantial cost to the MSOs. I understand that MSOs see Wi-Fi networks as an

⁵⁶ Interview with Tom Nagel, Senior Vice President and General Manager of Wireless Services, Comcast Communications, July 18, 2012.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

important aspect of the services provided to their core customer base, which help them to compete with other MVPDs.⁵⁹ This core customer base includes the customers of VZW's wireless competitors, who would have to be at least somewhat disadvantaged by an MSO's raising rivals cost strategy in order for the strategy to drive customers to VZW. Opposing parties have provided no evidence from which to conclude that Comcast, for example, would be willing to reduce the ability of any of its customers to use Wi-Fi offload services in order to harm VZW's wireless rivals. Even if such a strategy took the form of discriminatory terms on carrier-purchased Wi-Fi offload services, it still seems likely that many Comcast subscribers would view the strategy as a reduction in the quality of the services offered by Comcast, thus hurting Comcast's core consumer-facing product offerings.

IV. CONCLUSION

38. Based on my review of the available evidence, I find that the horizontal and vertical concerns raised by the opposing parties regarding both backhaul and Wi-Fi services are highly speculative and unfounded. I find no support for the claim that the Commercial Agreements would impede competition in the provision of backhaul or Wi-Fi services.

⁵⁹ *Ibid.*

Comcast provides Wi-Fi service as part of its Xfinity offerings. Comcast's Xfinity Wi-Fi provides a network of access points or hotspots that connect customers to the Internet and access to these hotspots is offered to Xfinity Internet customers. I understand that Xfinity Wi-Fi is included as a feature of Xfinity Internet service (Performance tier and above) at no additional charge to the customer. (See <http://customer.comcast.com/help-and-support/internet/about-xfinity-wifi-internet/>, site visited July 19, 2012).